

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NIGEL LEE WHITTAKER,

Defendant-Appellant.

UNPUBLISHED

March 27, 2007

No. 267043

Wayne Circuit Court

LC No. 05-007110-01

Before: Jansen, P.J., and Neff and Hoekstra, JJ.

PER CURIAM.

Defendant was convicted by a jury of four counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(c), one count of armed robbery, MCL 750.529, and one count of first-degree home invasion, MCL 750.110a(2). Pursuant to MCL 769.11, the trial court sentenced him as a third habitual offender to concurrent terms of 46 to 70 years in prison for each CSC I conviction, 26 to 50 years in prison for the armed robbery conviction, and 20 to 40 years in prison for the home invasion conviction. Defendant now appeals as of right, and we affirm.

I. Basic Facts

At the time of the events underlying this appeal, the 60-year-old female victim was undergoing cancer treatment, which required the use of a feeding tube. At approximately 1:00 a.m., defendant entered the victim's bedroom and awakened her as she slept. The victim felt "a nudge against [her] back and when [she] turned over . . . [defendant] was standing right over [her] bed." The victim testified that defendant "told me that he had a gun and he was [going to] blow my head off if I didn't be quiet." According to the victim, defendant then told her to remove her underwear and engaged in sexual acts with her. The victim testified that she tried to call for help, but defendant told her "to shut up or he'll kill [her]."

The victim testified at trial that defendant committed three acts of vaginal penetration and one act of oral penetration.¹ According to the victim, when defendant observed the feeding tube,

¹ Defense counsel noted that the victim had initially described to the police only two acts of vaginal penetration and one act of oral penetration. The victim testified that she had been "a
(continued...)

he stated that “it better not get in my way or I’ll pull it out.” The victim testified that this statement “definitely [made her] scared more than [she already] was.” She also testified that she told defendant to stop because she had heart problem, but that defendant told her to “shut up” and put his hand over her mouth.

The victim testified that after defendant had committed the sexual acts, he asked for money. The victim testified that she told defendant that there was \$200 in the office.² She took defendant to the office and gave him the money. Although the victim never saw a gun, she testified that she believed defendant’s threats and thought that defendant was armed. She testified that “[w]hen I would hesitate to do something, he would more or less remind me I have a gun, I will pop you.” After defendant had taken the money, he told the victim to return to her bedroom. According to the victim, defendant then engaged in further sex acts with her, including vaginal and oral penetration.

Thereafter, defendant apparently asked the victim whether she had any food, and she prepared food for him in the kitchen. The victim testified that defendant did not allow her to turn on the lights, but that two small lights were illuminated in the kitchen and she could see defendant’s face. As defendant ate, he spoke with the victim. He apparently told her that he was very tired and had to get up for work the next day. The victim testified that she told defendant that there was an empty apartment in the basement, and that he could sleep there. When she took defendant to the basement apartment, she turned on the lights and “that’s when [the victim] got an exact look at him.” The victim testified that she asked defendant how he entered the building, and that he responded that the door had been unlocked.

The victim then returned upstairs. She observed that a porch window had been opened and the screen had been ripped.³ The victim then heard the building’s maintenance man, Nick Sanchez, and she called out to him. Sanchez helped the victim into his apartment, where Sanchez called the police. When the police arrived, they transported the victim to the hospital, where she received treatment and medical staff performed a rape kit.

Other police officers went to the basement apartment, observing that the door was closed and locked. The officers requested that a supervisor come to the scene, and after knocking on the door with no response, the supervisor ordered a forced entry. Upon entering the basement apartment, officers observed defendant lying on a bed next to the door. Officers took defendant into custody but found no weapons on his person. They did, however, find \$200 in cash, which

(...continued)

little mixed up at the time . . . when [she] gave the statement.” The victim then reiterated and confirmed that there were four separate instances of penetration.

² The victim apparently lived in a back bedroom in the office of her apartment building. She formerly managed the office before contracting cancer. The owner of the building was allowing the victim to live in the back bedroom of the office while she recovered.

³ Nick Sanchez, the building’s maintenance man, indicated that chicken wire was nailed to the wood frame of the window as a security measure. Sanchez noted that the screen had been pulled up and the chicken wire had been pulled back from the window. A police officer also observed the condition of the window on the day of the incident, noting that the porch window was raised and its screen was cut.

fell out of defendant's clothing. After advising defendant of his *Miranda*⁴ rights, officers obtained a warrant to collect a DNA sample from defendant. The victim later identified defendant's photograph as that of her attacker. A photographic line-up was performed because the victim had been admitted to the hospital and was unable to observe a live line-up. Police laboratory testing was performed on a bed sheet recovered from the victim's bedroom. The test showed the presence of semen and blood, which contained DNA consistent with that collected from defendant.

Before trial, the prosecution indicated that the DNA expert who actually conducted the laboratory analysis could not be present at trial. Defense counsel objected, asserting that defendant "wants the person who actually conducted the test." The trial court nevertheless allowed substitution of a different DNA expert in the place of the expert who actually conducted the analysis and prepared the report.

Following defendant's convictions, defense counsel moved for a new trial. Counsel argued that it had not been proper for one laboratory analyst to testify from notes and a report prepared by a different, nontestifying laboratory analyst. Defense counsel argued that the expert who actually conducted the laboratory analysis should have testified, and that the substitution of a different DNA analyst raised Confrontation Clause and hearsay issues. Defense counsel asserted that the DNA report was testimonial in nature, and that defendant was denied the right to confront the person who actually prepared the report. The prosecution asserted that DNA reports are not testimonial, and also suggested that any confrontation error was harmless because the other evidence was sufficient to sustain the convictions. The trial court stated that there was "a very overwhelming amount of evidence" in this case, and denied defendant's motion for a new trial.

II. Pretrial Motion for Adjournment

Defendant first argues that the trial court erred in failing to grant a continuance or adjournment for the purpose of allowing him to obtain an independent DNA expert witness. We disagree.

A. Preservation of the Issue and Standard of Review

Defendant preserved this claim for our review by timely requesting an adjournment before trial. *People v Snider*, 239 Mich App 393, 421; 608 NW2d 502 (2000). We review the trial court's denial of a motion for a continuance or adjournment for an abuse of discretion. *People v Coy*, 258 Mich App 1, 17; 669 NW2d 831 (2003). The abuse of discretion standard "acknowledges that there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

B. Analysis

⁴*Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

A defendant must show good cause and diligence in requesting a motion for adjournment. *Coy, supra* at 18. However, even with a showing of good cause and diligence, a trial court's denial of a motion for adjournment will not be reversed "unless the defendant demonstrates prejudice as a result of the abuse of discretion." *Id.* at 18-19. A good cause determination may be based on the following factors: "whether defendant (1) asserted a constitutional right, (2) had a legitimate reason for asserting the right, (3) had been negligent, and (4) had requested previous adjournments." *Id.* at 18 (citation omitted).

Defendant moved for an adjournment five days before trial for the purpose of obtaining an independent expert to review the DNA evidence. Defendant argued below that the DNA report was submitted late, that the report was complex, and that an independent witness was therefore needed. The trial court denied the motion, noting that the trial date had already been delayed to obtain the DNA evidence in the first instance. The court pointed out that both parties knew about the DNA evidence and that they should have made timely arrangements to obtain necessary witnesses. The court also indicated that there was still at least one week until the first witness testified, and suggested that defense counsel still had enough time to obtain an independent witness if he chose to do so. Of particular note, defendant never argued in support of his motion that the requested adjournment would allow the author of the DNA report to be present at trial. Defendant did not raise this specific argument until his motion for a new trial, obviously filed well after the trial court had ruled on the motion for adjournment.

We conclude that the trial court properly denied defendant's motion because defendant did not act with good cause or due diligence in moving for the adjournment. *Id.* at 18. Defendant waited until five days before trial to request the adjournment, and knew full well that one adjournment had already been granted in order to obtain the DNA evidence. More importantly, defendant at no time asserted the constitutional right to confront the author of the DNA report, and objected to the unavailability of the DNA report's author only *after* the trial court ruled on his motion for adjournment. Therefore, the trial court was not aware of defendant's constitutional Confrontation Clause argument at the time of the motion, and correctly noted that both sides had possessed sufficient opportunity to obtain independent experts before trial. The trial court's denial of defendant's motion for adjournment fell within a reasonable and principled range of outcomes. *Babcock, supra* at 269. The trial court did not abuse its discretion in denying defendant's motion.

III. Hearsay Error and Confrontation Clause Violation

Defendant also argues that the police laboratory report constituted inadmissible hearsay, and that admission of the laboratory report, prepared by a nontestifying police expert, amounted to a Confrontation Clause violation.

A. Preservation of the Issue and Standard of Review

Defendant objected before trial to the court's substitution of a different expert for the analyst who actually prepared the laboratory report in this case. Defense counsel stated that defendant "want[ed] the person who actually conducted the test," and therefore implied that the objection was based on the hearsay rule alone. Indeed, defense counsel never mentioned a possible Confrontation Clause violation when raising his objection.

To preserve an issue for appellate review, a party must object below and specify the same ground for objection that it asserts on appeal. *People v Aldrich*, 246 Mich App 101, 116; 631 NW2d 67 (2001); see also *People v Grant*, 445 Mich 535, 545, 553; 520 NW2d 123 (1994). Defendant's Confrontation Clause issue is not preserved because, although defendant raised the issue in his motion for a new trial, he failed to object *on Confrontation Clause grounds* prior to the testimony of the alternate laboratory analyst. A hearsay objection is not sufficient to preserve for appeal the issue whether testimony was introduced in violation of the Confrontation Clause. *Coy, supra* at 12. Because defendant's objection below did not refer to an alleged Confrontation Clause violation, but was rather based on the hearsay rule alone, it was insufficient to preserve defendant's Confrontation Clause claim for our review.⁵ *Id.*

B. Analysis

However, any claim of error, whether analyzed as a preserved nonconstitutional claim of improper hearsay or as an unpreserved constitutional claim of Confrontation Clause error, is insufficient to warrant appellate relief because any error was not outcome-determinative. *People v Phillips*, 469 Mich 390, 396-397; 666 NW2d 657 (2003), quoting *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999) (holding that in cases of preserved, nonconstitutional error, "a defendant must demonstrate . . . that it 'is more probable than not that the error was outcome determinative'"); *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999) (holding that unpreserved constitutional claims are reviewed for outcome-determinative plain error).

Even absent the nontestifying police expert's notations and report, the other evidence against defendant was overwhelming, and we conclude that the jury would have likely found defendant guilty beyond a reasonable doubt. The victim testified at trial concerning defendant's alleged actions and the details of defendant's crimes. Moreover, the testimony of police officers regarding defendant's arrest fully corroborated the victim's version of events. The evidence showed that defendant was found in the empty basement apartment, that a window in the victim's building had been forced open, and that defendant possessed \$200 in cash at the time of his arrest.

Defendant asserts that in the absence of the DNA analysis and nontestifying expert's report, there was insufficient evidence to sustain his CSC convictions. He therefore contends that the erroneous admission of the DNA evidence at trial was outcome-determinative.⁶ It is well settled that the jury has the best opportunity to determine the credibility of the witnesses. *People*

⁵ Defendant did raise his Confrontation Clause argument in a post-verdict motion for a new trial. Indeed, defendant frames his entire argument on appeal as a challenge to the trial court's denial of his new trial motion. However, defendant's argument actually concerns the admission of the DNA report, and his post-verdict motion for a new trial was insufficient to preserve this issue for our review. Subsequently raising an issue in a post-verdict motion for a new trial is insufficient to properly preserve an issue that could have been raised by way of an earlier objection. *People v Willis*, 1 Mich App 428, 430; 136 NW2d 723 (1965).

⁶ Defendant does not directly challenge his home invasion and armed robbery convictions on appeal, and we note that the evidence provides adequate support for these convictions.

v Wolfe, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1201 (1992). “It is the jury’s task to weigh the evidence and decide which testimony to believe.” *People v Jones*, 115 Mich App 543, 553; 321 NW2d 723 (1982).

In the present case, the jury evidently chose to assign greater credit to the victim’s testimony than to that of defendant. Defendant’s suggestion that he would have been acquitted on the CSC charges in the absence of the DNA evidence is mere conjecture, and is unsupported by the law. Michigan has rejected the rule that a victim’s testimony must be corroborated in order to sustain a conviction of rape. *People v Inman*, 315 Mich 456, 471-472; 24 NW2d 176 (1946); *People v Coffman*, 45 Mich App 480, 488; 206 NW2d 795 (1973); *People v Brocato*, 17 Mich App 277, 290; 169 NW2d 483 (1969). Indeed, in cases of sexual assault, a conviction may “be based upon the uncorroborated testimony of the woman assaulted.” *People v Miller*, 96 Mich 119, 121; 55 NW 675 (1893). In such cases, the victim’s credibility is a matter left to the sole judgment of the jury. *Id.*

Here, the jury believed the victim’s testimony and convicted defendant. In light of the strong, unwavering victim testimony, we cannot say that it is more probable than not that the jury would have acquitted defendant in the absence of the laboratory evidence. Accordingly, any evidentiary error in this case was not outcome-determinative, *Phillips, supra* at 396, and did not result in the conviction of an actually innocent person or otherwise prejudice defendant’s substantial rights, *Carines, supra* at 763-764.

Affirmed.

/s/ Kathleen Jansen
/s/ Janet T. Neff
/s/ Joel P. Hoekstra